No. _____

In the
Supreme Court of the United States

NOMURA SECURITIES INTERNATIONAL, INC.;
RBS SECURITIES INC.,

Petitioners,

v.

FEDERAL HOUSING FINANCE AGENCY, as Conservator for the Federal National Mortgage Association and the Federal Home Loan Mortgage Corporation,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Housing and Economic Recovery Act of 2008, which extends "the applicable statute of limitations" for claims brought by the Federal Housing Finance Agency, displaces federal and state statutes of repose as well as statutes of limitations.

2. Whether the Seventh Amendment requires a claim under Section 12(a)(2) of the Securities Act of 1933 to be tried to a jury.

PARTIES TO THE PROCEEDING

Petitioners Nomura Securities International, Inc. and RBS Securities Inc. f/k/a Greenwich Capital Markets, Inc. were defendants-appellants below.

Respondents David Findlay, Nathan Gorin, John P. Graham, N. Dante Larocca, John McCarthy, Nomura Holding America Inc., Nomura Asset Acceptance Corporation, Nomura Home Equity Loan, Inc., and Nomura Credit & Capital, Inc. were also defendants-appellants below.

Respondent Federal Housing Finance Agency was plaintiff-appellee below.

CORPORATE DISCLOSURE STATEMENT

Petitioner Nomura Securities International, Inc. is a wholly-owned subsidiary of Nomura Holding America Inc., a private company wholly owned by Nomura Holdings, Inc. Nomura Holdings, Inc. is a publicly held corporation that has no parent corporation, and no publicly held company owns 10% or more of its stock.

Petitioner RBS Securities Inc. f/k/a Greenwich Capital Markets, Inc. is wholly owned by RBS Holdings USA Inc., which in turn is wholly owned by NatWest Group Holdings Corporation, which in turn is wholly owned by National Westminster Bank plc, which in turn is wholly owned by NatWest Holdings Limited, which in turn is wholly owned by The Royal Bank of Scotland plc, which in turn is wholly owned by The Royal Bank of Scotland Group plc. The Royal Bank of Scotland Group plc has no parent corporation, and no publicly held company owns 10% or more of its stock.

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PETITION FOR WRIT OF CERTIORARI

In two recent decisions, this Court has emphasized that statutes of repose are not just statutes of limitations by another name. Each type of statute "has a distinct purpose," and each "is targeted at a different actor." *CTS Corp. v. Waldburger*, 134 S. Ct. 2175, 2183 (2014). Statutes of limitations "are designed to encourage plaintiffs 'to pursue diligent prosecution of known claims.'" *Cal. Pub. Emps.' Ret. Sys. v. ANZ Sec., Inc.*, 137 S. Ct. 2042, 2049 (2017) (quoting *CTS*, 134 S. Ct. at 2182). In contrast, "statutes of repose are enacted to give more explicit and certain protection to defendants" by "grant[ing] complete peace to defendants" after a specified period of time. *Id.* at 2049, 2052 (citation omitted). Thus, statutes of repose establish "an absolute bar on a defendant's temporal liability," and events that extend a statute of limitations have no effect on a statute of repose. *Id.* at 2050.

In this case, the Second Circuit gave those critical distinctions—and this Court's recent decisions reaffirming them—short shrift while giving the federal government an unjustified $800 million windfall. Section 4617(b)(12) of the Housing and Economic Recovery Act of 2008 (HERA) extends "the applicable statute of limitations" for contract and tort claims brought by the Federal Housing Finance Agency (FHFA). 12 U.S.C. §4617(b)(12). The provision three times references "statute[s] of limitations," and four times references "the date on which the [relevant] cause of action accrues," a factor relevant only to statutes of limitations. HERA never once refers to statutes of *repose*, much less to

extending their absolute terms. The Second Circuit nonetheless held that §4617(b)(12) "displaces" not only the federal statute of repose in the Securities Act of 1933 but state-law repose periods as well, thereby affirming an $800 million judgment against petitioners based on federal- and state-law securities claims that were indisputably outside the repose periods when the federal government brought them.

To reach that exceptional result, the Second Circuit flouted this Court's most recent precedents addressing statutes of repose and rendered nugatory the Court's admonition that statutes of repose "give a defendant a complete defense to any suit after a certain period." *ANZ*, 137 S. Ct. at 2049. Indeed, the Second Circuit relied largely on its own caselaw predating *ANZ* and *CTS*. Those two recent decisions make pellucidly clear, however, that statutes of repose are not just another form of statutes of limitations that can be extended whenever judges deem it equitable. Instead, this Court's cases firmly embrace the modest but critical proposition that repose means repose. And perhaps the only thing more troubling than vitiating that principle and treating statutes of repose as mere limitations periods would be doing so for the exclusive benefit of the federal government. Yet that is precisely what the Second Circuit did here. Statutes of repose are particularly critical when it comes to defendants facing the litigation resources of the federal government, and the resulting interference with defendants' vested rights raises constitutional concerns that Congress could not have contemplated in a statute that mentions only limitations, not repose.

But the Second Circuit's errors do not stop there. Under the Seventh Amendment, "actions enforcing statutory rights" must be tried by a jury "if the statute creates legal rights and remedies." *Curtis v. Loether*, 415 U.S. 189, 194 (1974). Petitioners were subjected to a bench trial, over their objections, for claims under Section 12(a)(2) of the Securities Act. The elements of that claim parallel the elements of a claim under Section 11 of the Act, which is indisputably "legal" for Seventh Amendment purposes. Moreover, Section 12 authorizes recovery of money damages (the classic form of legal relief) and a form of rescission that mirrors the type of rescission available in pre-merger courts of law. The Second Circuit nonetheless affirmed FHFA's eleventh-hour request for a bench trial (made only after indisputably legal claims were dropped and earlier rulings signaled the judge's favorable disposition to FHFA's claims). The Second Circuit believed this Court's precedent tied its hands, but that is demonstrably wrong and underscores the need for this Court's review. The centrality of the jury right, especially when defendants face off against the federal government and are forced to pay the government hundreds of millions in cash, is too important for the decision below to stand.

OPINIONS BELOW

The Second Circuit's opinion is reported at 873 F.3d 85 and reproduced at App.1-143. The district court's unpublished opinion denying petitioners' motion for summary judgment on the statute of repose issue is reported at 2014 WL 4276420 and reproduced at App.145-61. The district court's opinion stating that no jury-trial right exists for Section 12 claims is

reported at 68 F. Supp. 3d 486 and reproduced at App.162-85. The district court's opinion determining liability and damages is reported at 104 F. Supp. 3d 441 and reproduced at App.186-516.

JURISDICTION

The Second Circuit issued its opinion on September 28, 2017, and denied petitioners' rehearing petition on December 11, 2017. This Court has jurisdiction under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The HERA "extender statute," 12 U.S.C. §4617, is reproduced at App.516-81. The Seventh Amendment to the United States Constitution is reproduced at App.516.

STATEMENT OF THE CASE

A. The Securities Act and State Blue Sky Laws

1. "The Securities Act of 1933 'protects investors by ensuring that companies issuing securities … make a "full and fair disclosure of information" relevant to a public offering.'" *ANZ*, 137 S. Ct. at 2047 (alteration in original); *see* 48 Stat. 74, as amended, 15 U.S.C. §77a *et seq*. Among the Act's many disclosure requirements are the dual mandates that no security may be sold "unless accompanied or preceded by a prospectus," 15 U.S.C. §77e(b), and that each prospectus "shall contain" certain specified facts, *id*. §77j(a).

Under Section 12(a)(2) of the Securities Act, anyone who "solicits securities sales for financial gain" or "who actually parts title with the securities"—so-

called "statutory sellers"—may be liable to purchasers of securities offered "by means of a prospectus" where the prospectus contains a material misstatement or omission of which the purchaser was unaware. *Pinter v. Dahl*, 486 U.S. 622, 648-50 (1988); *see* 15 U.S.C. §77*l*(a)(2). The elements of a claim under Section 12(a)(2) are "roughly parallel" to the more-commonly-used Section 11 of the Act, which "prohibits materially misleading statements or omissions in registration statements filed with the SEC." *In re Morgan Stanley Info. Fund Sec. Litig.*, 592 F.3d 347, 358-59 (2d Cir. 2010); *see* 15 U.S.C. §77k.

Purchasers establishing a Section 12(a)(2) claim have two mutually exclusive recovery options. Purchasers that still own the security may, "upon the tender of such security," rescind the contract and return the security to the defendant in exchange for the purchase price, less any income and interest. 15 U.S.C. §77*l*(a)(2). Purchasers that "no longer own[] the security," in contrast, may recover "damages." *Id.* In either case, a defendant may assert a "loss causation" defense that reduces the amount owed by any depreciation in value resulting from something other than the misstatement or omission. *Id.* §77*l*(b).

A claim under Section 12(a)(2) must be filed in conformity with the two time bars set forth in Section 13 of the Act: a one-year statute of *limitations* and a three-year statute of *repose*. *See id.* §77m. The shorter limitations period "may be tolled" where circumstances demand flexibility; the longer period may not. *ANZ*, 137 S. Ct. at 2053. "In no event" may one recover on a Section 12 claim filed "more than

three years after the sale" of the security. 15 U.S.C. §77m; *see ANZ*, 137 S. Ct. at 2047-55.

2. In addition to the Securities Act, so-called Blue Sky laws "apply to dispositions of securities *within* [each] state." *Hall v. Geiger-Jones Co.*, 242 U.S. 539, 557 (1917). Two such statutes—the Virginia Securities Act and the D.C. Securities Act—are relevant here. The two Blue Sky laws are effectively identical to the Securities Act when it comes to liability. *Dunn v. Borta*, 369 F.3d 421, 428 (4th Cir. 2004); *Hite v. Leeds Weld Equity Partners, IV, LP*, 429 F. Supp. 2d 110, 114 (D.D.C. 2006). They also contain statutes of repose substantively identical to the statute of repose in Section 13 of the Securities Act. *See* Va. Code Ann. §13.1-522(D) (two-year statute of repose); D.C. Code §31-5606.05(f)(1) (three-year statute of repose).

B. The RMBS Purchases and the Enactment of HERA

1. This case arises out of the sale of residential mortgage-backed securities, or RMBS, to two government-sponsored entities, the Federal National Mortgage Association (Fannie Mae) and the Federal Home Loan Mortgage Corporation (Freddie Mac).[1] Fannie and Freddie are privately owned, publicly chartered corporations that Congress created to help

[1] RMBS are "intricately structured financial instruments backed by hundreds or thousands of individual residential mortgages, each obtained by individual borrowers for individual houses." App.197. A buyer of an RMBS certificate "pays a lump sum in exchange for a certificate representing the right to a future stream of income from the mortgage loans' principal and income payments." App.11; *see* App.14-20.

provide liquidity in the residential mortgage market. App.21; *see* National Housing Act Amendments of 1938, ch. 13, 52 Stat. 8; Emergency Home Finance Act of 1970, Pub. L. No. 91-351, 84 Stat. 450. Fannie and Freddie accomplished that goal in two ways: they bought mortgage loans directly from originators—which helped replenish originators' capital, and thus facilitated the issuance of new mortgage loans—and they bought RMBS from private banks—which "funnel[led] cash back through [the certificates'] sponsors and underwriters to loan originators for use in future loans." App.22.

Fannie and Freddie's RMBS purchasing activity was prolific. At one point, they accounted for almost 10% of all private RMBS sales in the U.S. App.22. By 2005, Fannie and Freddie owned $350 billion worth of privately issued RMBS, a majority of which was backed by loans rated lower than prime. App.22.[2]

Fannie and Freddie's RMBS buying spree coincided with the housing bubble. From 2000 to 2008, "aggregate mortgage debt in the U.S. more than doubled." App.25. Eventually, however, the bubble burst. By May 2009, the average home price had fallen almost 33% from its April 2007 peak, and nearly a quarter of American homeowners were left with negative equity. App.26.

2. This series of events left Fannie and Freddie—holders of mortgages and RMBS whose values had plummeted—in precarious financial positions. To

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[2] $145 billion was backed by subprime loans, and another $40 billion was backed by Alt-A loans (*i.e.*, loans rated lower than prime but higher than subprime). App.22.

address this concern, Congress enacted HERA, which created FHFA, an "independent agency of the Federal Government," 12 U.S.C. §4511(a), to serve as conservator and receiver for Fannie, Freddie, and other government-sponsored entities in financial straits. *See* Housing and Economic Recovery Act of 2008, Pub. L. No. 110-289, 122 Stat. 2654; *FHFA v. UBS Ams. Inc.*, 712 F.3d 136, 138 (2d Cir. 2013); 12 U.S.C. §4617(a). HERA empowered FHFA to, *inter alia*, "collect all obligations and money due" to Fannie and Freddie. 12 U.S.C. §4617(b)(2)(B)(ii). HERA specifically authorized the new agency to bring suit on Fannie and Freddie's behalf. *See id.* §4617(b)(2)(J).

HERA includes an "extender" provision lengthening statutes of limitations for certain claims brought by FHFA. Specifically, under HERA, "the applicable statute of limitations with regard to any action" in which FHFA is the plaintiff "shall be":

> (i) in the case of any contract claim, the longer of—
>
> > (I) the 6-year period beginning on the date on which the claim accrues; or
> >
> > (II) the period applicable under State law; and
>
> (ii) in the case of any tort claim, the longer of—
>
> > (I) the 3-year period beginning on the date on which the claim accrues; or
> >
> > (II) the period applicable under State law.

Id. §4617(b)(12)(A). HERA further provides that "[f]or purposes of subparagraph (A), the date on which the

statute of limitations begins to run on any claim described in such subparagraph shall be the later of—(i) the date of the appointment of the Agency as conservator or receiver; or (ii) the date on which the cause of action accrues." *Id.* §4617(b)(12)(B).

C. The District Court Proceedings

1. On September 2, 2011, pursuant to HERA, FHFA initiated sixteen securities actions in the Southern District of New York against financial institutions that sold RMBS certificates to Fannie and Freddie in the mid-2000s. The suits were later consolidated, and fifteen of the sixteen settled before trial. The present action is the lone exception. App.28.

This action concerns seven RMBS certificates Fannie and Freddie purchased from petitioners Nomura Securities International, Inc. and RBS Securities Inc. between 2005 and 2007. App.2-3.[3] Fannie and Freddie paid approximately $2.05 billion for the seven certificates. App.23. The loans supporting the certificates were predominantly subprime and Alt-A. App.23. Each certificate was offered by means of a prospectus supplement, which described the credit characteristics of the underlying loans and affirmed that the loans "were originated generally in accordance with [certain specified] underwriting criteria." App.3, 23.

FHFA alleged that the prospectus supplements falsely described the loans as generally complying

[3] Petitioners were the securities' lead underwriters; Respondents Nomura Home Equity Loan, Inc. and Nomura Asset Acceptance Corporation were the depositors. App.215-16.

with underwriting guidelines and contained inaccurate loan-to-value ratios of the underlying loans. App.27-28. As relevant here, FHFA brought claims under Sections 11 and 12(a)(2) of the Securities Act as well as Virginia's and D.C.'s Blue Sky laws. FHFA named as defendants the lead underwriters (petitioners here); the depositors, *see* n.3, *supra*; and seven alleged "control persons": the sponsor of the securitizations (Nomura Credit & Capital, Inc.), a holding company (Nomura Holding America, Inc.), and five individuals who were employees, officers, or directors of other defendants.[4]

2. It is undisputed that the last RMBS sale at issue took place in 2007—more than four years before FHFA filed suit. Petitioners thus moved for summary judgment under the respective statutes of repose of the Securities Act and the Blue Sky laws. Citing Second Circuit precedent providing that HERA "supplants any other time limitations that otherwise might have applied" as to "*all* claims brought by FHFA as conservator," the district court denied the motion, noting that the government's claims were "contract claims" filed within six years of FHFA's appointment as conservator. App.149-53; *UBS*, 712 F.3d at 143-44.

The district court subsequently issued a number of pretrial rulings; all favored FHFA. *See, e.g.*, *FHFA v. HSBC N. Am. Holdings Inc.*, 33 F. Supp. 3d 455 (S.D.N.Y. 2014) (granting FHFA's motion for summary judgment on Section 12(a)(2)'s absence-of-

[4] FHFA brought claims against the "control persons" pursuant to Section 15 of the Securities Act, which imposes joint-and-several liability on "[e]very person who … controls any person liable under" Sections 11 or 12. 15 U.S.C. §77*o*(a).

knowledge element); *FHFA v. Nomura Holding Am. Inc.*, 68 F. Supp. 3d 439 (S.D.N.Y. 2014) (granting FHFA's motion for summary judgment on reasonable care); *FHFA v. Nomura Holding Am., Inc.*, 68 F. Supp. 3d 499 (S.D.N.Y. 2014) (granting FHFA's motion *in limine* to exclude evidence related to timing of purchases).

Following that series of favorable decisions by the court, and shortly before a jury trial was to begin, FHFA voluntarily withdrew its indisputably legal Section 11 claims and moved for a bench trial on its remaining Section 12(a)(2) claims on the theory that those claims did not implicate petitioners' jury-trial rights. App.30-31. Petitioners raised a Seventh Amendment objection, but the district court rejected it. App.179-85.

At the end of the subsequent bench trial, the district court found in favor of FHFA on every claim, and awarded FHFA more than $800 million in damages—some $250 million for violations of Section 12(a)(2) of the Securities Act, and some $555 million for violations of the state Blue Sky laws. App.186-515.[5]

D. The Second Circuit's Decision

The Second Circuit affirmed. As to the timeliness of the government's suit, the Second Circuit invoked the same circuit precedent that the district court had invoked, *UBS*, which held that HERA "displaces" the

[5] Pursuant to Section 15 of the Securities Act, the district court also imposed joint-and-several liability on all seven of the "control persons" identified by the government, including the five individual defendants. App.483-502.

statute of repose in both Section 13 of the Securities Act and the Virginia and D.C. Blue Sky laws. App.32-38; *see UBS*, 712 F.3d at 143-44. The court then addressed whether this Court's subsequent decision in *CTS* abrogated *UBS*. App.39-44. Turning again to its own precedent, the Second Circuit noted that it had recently rejected that proposition in the context of the federal Securities Act's statute of repose. *See FDIC v. First Horizon Asset Sec., Inc.*, 821 F.3d 372, 380-81 (2d Cir. 2016). The court nevertheless examined whether *CTS* abrogated *UBS*'s holding that §4617(b)(12) preempts state-law repose periods. The court acknowledged that §4617(b)(12) "uses some similar language" as 42 U.S.C. §9658, the statute at issue in *CTS*, which this Court held does not preempt state statutes of repose. App.41. But the Second Circuit nevertheless "reaffirm[ed] [its] prior holding that Congress designed §4617(b)(12) to pre-empt state statutes of repose." App.44.

As to the Seventh Amendment issue, the Second Circuit held that, notwithstanding the $800-million award, petitioners were not constitutionally entitled to a jury trial on the government's Section 12(a)(2) claims. In its view, there was a "long-established consensus that Section 12(a)(2) is an equitable claim that authorizes equitable relief." App.91-92. The court thus held that suits under Section 12(a)(2) are not actions "at common law" under the Seventh Amendment, at least "where the plaintiff still owns the securities and the remedy sought is literal rescission." App.94.

The Second Circuit proceeded to uphold the district court's liability determination across the board, affirming the $800-million-plus judgment.

REASONS FOR GRANTING THE PETITION

The Second Circuit's decision is irreconcilable with this Court's recent decisions in *ANZ* and *CTS*, which establish that statutes of limitations and statutes of repose are not simply interchangeable synonyms and that repose means repose. Section 4617(b)(12) of HERA extends the "statute of limitations" for tort and contract claims brought by FHFA. It refers three times to "statute of limitations," and four times to the accrual of a claim, a concept relevant only to statutes of limitations. Not once does HERA mention "statutes of repose" or give any indication that it displaces statutes of repose. Under *ANZ* and *CTS*, therefore, this should have been an easy case: §4617(b)(12) extends the statutes of limitations applicable to plaintiffs' claims, but does not displace defendants' vested rights in statutes of repose. Nothing in §4617(b)(12) suggests that Congress meant to displace statutes of repose (or considered the constitutional difficulties with doing so), much less that it acted with the clear and manifest intent necessary to impliedly repeal Section 13's statute of repose or to preempt the States' statutes of repose.

The Second Circuit's decision, however, barely mentions *ANZ*, even though it is this Court's last word on statutes of repose and squarely addressed (and rejected) an argument that Section 13's statute of repose had been extended just like a statute of limitations. And it considered *CTS* only to determine

whether it fatally "undermined" prior circuit precedent. The combined teaching of *ANZ* and *CTS* is unmistakable: Statutes of limitations and repose are fundamentally different, and repose truly means repose, so events that extend the statute of limitations leave the repose period unaffected. In short, the conflict between the decision below and *ANZ* and *CTS* is clear and merits this Court's review.

As the Court's recent grants of certiorari in *ANZ* and *CTS* confirm, whether federal law directed only to statutes of limitations nevertheless displaces statutes of repose is a recurring and important question. And there are numerous factors that make plenary review particularly important here. While *ANZ* and *CTS* involved efforts to override a single federal statute of repose for the benefit of all plaintiffs asserting a limited class of federal claims, the Second Circuit construed HERA to displace *all* statutes of repose—at both the federal *and state* levels. To make matters worse, HERA carves out this unprecedented exception to federal and state statutes of repose solely for the benefit of the federal government. Because HERA itself mentions only statutes of limitations, there is no reason to think that Congress considered or wanted to implicate the distinct constitutional concerns with overriding defendants' vested rights in repose for the exclusive benefit of the federal government. Furthermore, the issue recurs in other materially identical "extender" statutes, and because the Second Circuit is the epicenter of the financial markets, its decision rejecting *ANZ* and *CTS* has outsized practical importance.

Certiorari is independently warranted to correct the Second Circuit's error in denying petitioners' Seventh Amendment rights to have a jury consider the government's claims for hundreds of millions of dollars under Section 12(a)(2) of the Securities Act. The decision below deprives petitioners of that "vital and cherished right, integral in our judicial system." *City of Morgantown v. Royal Ins. Co.*, 337 U.S. 254, 258 (1949). The elements of a Section 12(a)(2) claim parallel the elements of a Securities Act claim under Section 11, which is indisputably "legal" and triggers Seventh Amendment protections. Section 12(a)(2) likewise allows recovery of either money damages (the classic form of legal relief) or *legal* rescission, and it contains a loss-causation defense incompatible with common-law equity. The Second Circuit nevertheless held that petitioners were not entitled to a jury trial because of a supposed "consensus" that Section 12(a)(2) is an equitable claim authorizing equitable relief. But nothing in this Court's decisions so holds, and indeed, those precedents cut exactly the other way. Given the fundamental importance of the jury right and the Second Circuit's plainly incorrect decision, the Court's review is imperative.

I. The Court Should Grant Certiorari To Determine Whether HERA's Extension Of Statutes Of Limitations Applies To Statutes Of Repose.

HERA extends "the applicable statute of limitations" for contract and tort claims brought by FHFA to six and three years, respectively. 12 U.S.C. §4617(b)(12)(A). While HERA three times refers to statutes of limitations by name, it never once

mentions statutes of *repose*. And as this Court has emphasized twice in the past four Terms, statutes of repose are by no means merely statutes of limitations by another name. Instead, statutes of repose "grant complete peace to defendants" after a specified period of time, *ANZ*, 137 S. Ct. at 2052, and confer vested rights in true repose. Accordingly, any effort to apply HERA's "statute[s] of limitations" extender to statutes of repose should be a non-starter. Yet rather than grapple with this Court's recent *CTS* and *ANZ* decisions, the Second Circuit gave both short shrift, barely citing *ANZ* and only assessing whether *CTS* required reconsideration of prior circuit precedent. In reality, the decision below cannot be reconciled with *ANZ*, *CTS*, or HERA's plain and unambiguous text. Review of this important and recurring question is plainly warranted.

A. HERA Does Not Override Statutes of Repose in the Securities Act or Preempt State Blue Sky Laws.

1. After *ANZ*, there can be no real dispute about the nature and purpose of the Securities Act's three-year statute of repose. Section 13 of the Securities Act "reflects the legislative objective to give a defendant a *complete defense* to any suit after a certain period." *Id.* at 2049 (emphasis added). It "provides in clear terms that '*[i]n no event*' shall an action be brought more than three years after the securities offering on which it is based." *Id.* (alteration in original) (emphasis added). And it "*admits of no exception*." *Id.* (emphasis added); *see* 15 U.S.C. §77m.

ANZ also makes clear that *not* treating Section 13's three-year period as an "absolute bar on a

defendant's temporal liability" would make nonsense of the statute as a whole. 137 S. Ct. at 2050 (quoting *CTS*, 134 S. Ct at 2183). Section 13 includes a one-year statute of limitations—which itself contains an express discovery rule—and adds an absolute statute of repose on top of it. *See Gabelli v. SEC*, 568 U.S. 442, 453 (2013). Those two periods "work together": The "discovery rule gives leeway to a plaintiff who has not yet learned of a violation," while "the rule of repose protects the defendant from an interminable threat of liability." *ANZ*, 137 S. Ct. at 2049-50. Allowing Section 13's three-year period to be extended, "even in cases of extraordinary circumstances," *CTS*, 134 S. Ct. at 2183, would thus render it superfluous.

It is thus plain that, after *ANZ*, petitioners could not have been subject to the government's federal securities suit here absent HERA. It is undisputed that the last RMBS sale at issue took place in 2007, more than *four years* before the government's suit. Any federal suit premised on the facts here should have been barred by Section 13's statute of repose.

2. Although Section 13's statute of repose "admits of no exception," *ANZ*, 137 S. Ct. at 2049, the Second Circuit nevertheless found one in HERA. But nothing in HERA even refers to statutes of repose, much less indicates a congressional intent to confront the distinct issues implicated by overriding them. On the contrary, the relevant HERA provision refers, three times, to "statute[s] of limitations." 12 U.S.C. §4617(b)(12). Given the well-established distinctions between statutes of limitations and statutes of repose, Congress' repeated references to "statute[s] of limitations" reflect a deliberate decision to extend only

the former, and not the latter. *See CTS*, 134 S. Ct. at 2185. That understanding is reinforced by HERA's four references to "the date on which the [relevant] cause of action accrues." As *ANZ* and *CTS* both explain, the notion of an "accrual" date is relevant only to statutes of limitations and is completely foreign to statutes of repose, which foreclose an action after a certain period of time regardless of when any claim might have accrued. *ANZ*, 137 S. Ct. at 2049; *CTS*, 134 S. Ct. at 2182-83.

Eliminating Section 13's statute of repose based on HERA's reference to a statute of limitations disregards the critically "distinct purpose[s]" between the former and the latter with respect to the actors at which they are targeted. *ANZ*, 137 S. Ct. at 2049 (quoting *CTS*, 134 S. Ct. at 2182). The purpose of a statute of repose is "to protect *defendants* against future liability" after a specified time. *Id.* at 2055 (emphasis added). The purpose of a statute of limitations, in contrast, is "to encourage *plaintiffs* 'to pursue diligent prosecution of known claims.'" *Id.* at 2049 (emphasis added) (quoting *CTS*, 134 S. Ct. at 2182-83). Section 4617(b)(12) is explicitly defined by reference to the particular *plaintiff* bringing suit (FHFA), and it explicitly extends only time bars applicable to that *plaintiff*—telltale signs that the provision was focused on and limited to statutes of limitations. In contrast, nothing suggests any intention to trump a time bar designed "to give the *defendant* full protection after a certain time," *i.e.*, a statute of repose. *Id.* at 2053 (emphasis added).

The *non-obstante* clause of §4617(b)(12) provides a further textual clue that HERA displaces only

statutes of limitations, not statutes of repose. Rather than choose *non-obstante* language signaling broad superseding intent—for example, "notwithstanding any other provision of Federal or State law," 12 U.S.C. §1821(m)(10)—Congress used much narrower language: "Notwithstanding any provision of any contract…." That narrower language makes sense only if §4617(b)(12) preempts statutes of limitations but not statutes of repose, because a contract can displace an otherwise-applicable statute of limitations, but cannot displace a statute of repose. *See NCUA v. Barclays Capital Inc.*, 785 F.3d 387, 391 (10th Cir. 2015) ("A statute of limitations, in contrast to a statute of repose, is waivable unless the statute says otherwise."). The text and structure of §4617(b)(12) are thus clear: statutes of limitations are displaced; statutes of repose are not.

3. In holding that HERA supplanted Section 13's statute of repose, the Second Circuit barely grappled with the text of either the Securities Act or HERA. And it almost entirely disregarded *ANZ*, even though that decision not only comprises this Court's most recent word on statutes of repose but also made clear beyond cavil that Section 13 features a three-year statute of repose. Instead, the Second Circuit deferred almost entirely to its own precedent, some of which predates not just *ANZ* but *CTS*—the Court's penultimate word on statutes of repose—and none of which can be reconciled with those decisions.

For example, the Second Circuit repeatedly cited its 2013 decision in *UBS*, which predates both *ANZ* and *CTS*. There, the court construed §4617(b)(12)'s language to mean that "Congress precluded the

possibility that some other limitations period might apply to claims brought by FHFA as conservator." 712 F.3d at 142. That is right—but completely irrelevant to the question whether Congress intended for existing *repose* periods to apply when it comes to claims brought by FHFA. Given the distinctions that the later-decided *CTS* and *ANZ* drew between statutes of limitations and statutes of repose, the fact that Congress intended HERA's limitations period for FHFA to trump other limitations periods applicable to FHFA's claims says nothing about whether Congress intended HERA to eliminate the complete peace conferred on defendants by repose periods.

UBS—and, by extension, the decision below—based its conclusion not on any close analysis of HERA's text but on speculation that it "must have been evident to Congress" that FHFA would pursue claims under federal and state securities laws. 712 F.3d at 142. Thus, it "would have made no sense for Congress to have carved out securities claims from the ambit of the extender statute." *Id.* That unsupported reasoning led the court to conclude that "[a]lthough statutes of limitations and statutes of repose are distinct in theory," they are not sufficiently distinct in practice that HERA's explicit reference only to one should not be understood implicitly to encompass both. *Id.* at 142-43; *see* App.34-40. But, again, that reasoning is irreconcilable with *ANZ* and *CTS*, which reject the notion that distinctions between statutes of limitations and statutes of repose are simply "theoretical." To the contrary, as *ANZ* explained, there are many real-world distinctions between the two; for example, statutes of repose, unlike statutes of limitations, are not subject to equitable tolling. *See*

137 S. Ct. at 2051. Indeed, the determination in *ANZ* that the time period there was a statute of repose, and not a statute of limitation, was "critical," for that meant that the period was "not subject to tolling." *Id.* at 2050.[6]

Treating HERA as supplanting Section 13's statute of repose also violates the presumption against implied repeals. To be sure, the fact that a court may not use its equitable authority to extend Section 13's repose period does not mean that Congress may not legislatively do so. *See id.* But implied repeals—and implied amendments, for that matter—"will not be presumed unless the intention of the legislature to repeal is clear and manifest." *Nat'l Ass'n of Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 662, 664 n.8 (2007) (quotation marks and alteration omitted). There is nothing in HERA that signals Congress' "clear and manifest" intent to repeal or amend Section 13's statute of repose, particularly given that "the text, purpose, structure, and history of [Section 13] all disclose the congressional purpose to offer defendants *full and final security* after three years." *ANZ*, 137 S. Ct. at 2052 (emphasis added). Thus, *UBS's* stated belief that if Congress "had really wanted" HERA *not* to displace statutes of repose, "it surely would have [said] so clearly and explicitly," 712

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[6] In a divided opinion, the Second Circuit reaffirmed *UBS* in *FDIC v. First Horizon Asset Sec., Inc.*, 821 F.3d 372 (2d Cir. 2016). But *First Horizon*, which the decision below barely cited, simply looked to whether *CTS* "undermine[d] the authority of *UBS*," *id.* at 381, and it predated *ANZ*. *UBS* represents the Second Circuit's last plenary review of this issue.

F.3d at 143, gets the presumption against implied repeals entirely backwards.

The presumption against implied repeals applies with particular force to statutes of repose because they confer vested rights to repose that differ from a defendant's interest in having the statute of limitations run. A statute purporting to extend a statute of repose, especially after that period has run, would plainly interfere with the defendants' vested rights and raise constitutional concerns under the due process and takings clause. *See Chase Sec. Corp. v. Donaldson*, 325 U.S. 304, 312 n.8 (1945) ("[W]here a statute in creating a liability also put[s] a period to its existence, a retroactive extension of the period after its expiration amount[s] to a taking of property without due process of law."). Although the three-year statute of repose had not run here at the point HERA was enacted, the government's theory would apply equally to such claims. Because the statute cannot mean one thing for some claims and another thing for other claims, *see Clark v. Martinez*, 543 U.S. 371, 378 (2005), the way to avoid the constitutional difficulties is to read HERA's references to statutes of limitations to apply only to statutes of limitations and not statutes of repose.

UBS and the decision below concluded that HERA was intended to allow FHFA to "'collect all obligations and money due' to [Fannie and Freddie] to restore them to a 'sound and solvent condition.'" 712 F.3d at 141-42 (quoting 12 U.S.C. §§4617(b)(2)(B)(ii), (D)); *see also* App.34-37. But while that may be a fair characterization of HERA's purpose, "no legislation pursues its purposes at all costs," *CTS*, 134 S. Ct. at

2185, and both *ANZ* and *CTS* make clear that giving FHFA the power to override statutes of repose in addition to statutes of limitations is no minor extension. Courts thus not only start with "the language of the statute itself" in interpreting a statute, *Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980); they generally end there and "ordinarily resist reading words or elements into a statute that do not appear on its face," *Dean v. United States*, 556 U.S. 568, 572 (2009). As the face of §4617(b)(12) refers only (and repeatedly) to statutes of limitations, construing HERA to apply to statutes of repose violates this well-established rule.

4. For substantially the same reasons that HERA's extension of statutes of limitation does not repeal the three-year statute of repose in Section 13 of the Securities Act, it does not preempt statutes of repose in state Blue Sky laws, including the D.C. and Virginia laws at issue here. As with the federal securities claims, there is no dispute that the government's state-law securities claims here are foreclosed by the respective statutes of repose absent HERA. The government has never identified any material difference between the statutes of repose in Section 13 and the statutes of repose in the state laws. Accordingly, just as §4617(b)(12) does not extend Section 13's statute of repose, it does not extend the D.C. or Virginia statutes of repose.

That conclusion comports with established preemption law. When a federal law "contains an express preemption clause," as §4617(b)(12) does, courts must "focus on the plain wording of the clause,

which necessarily contains the best evidence of Congress' preemptive intent." *Chamber of Commerce of U.S. v. Whiting*, 563 U.S. 582, 594 (2011) (quoting *CSX Transp., Inc. v. Easterwood*, 507 U.S. 658, 664 (1993)). The "plain wording" of §4617(b)(12) makes clear Congress' preemptive intent: In enacting a new statute of limitations to govern "any action" brought by FHFA in contract or tort, Congress unquestionably preempted state *limitations* periods. 12 U.S.C. §4617(b)(12). But that is all it did. Nothing in the "plain wording" of §4617(b)(12) mentions—much less demonstrates an intent to preempt—state statutes of repose, which *ANZ* and *CTS* underscore are critically different from statutes of limitations. Moreover, "the States' coordinate role in government counsels against reading federal laws such as [§4716(b)(12)] to restrict the States' sovereign capacity to regulate in areas of traditional state concern." *CTS*, 134 S. Ct. at 2185 (quotation marks omitted).[7]

As with its analysis of the impact of HERA on Section 13's statute of repose, the Second Circuit did not address the impact of HERA on state-law statutes of repose with a full analysis of the relevant statutory text, congressional intent, or this Court's recent *ANZ* decision. Instead, it proceeded to examine whether this Court's *CTS* decision "undermined" its own prior

[7] To the extent that "well-established 'presumptions about the nature of pre-emption'" apply, *CTS*, 134 S. Ct. at 2188 (opinion of Kennedy, J.), they further counsel against preemption of state statutes of repose. When "the text of a pre-emption clause is susceptible of more than one plausible reading, courts ordinarily 'accept the reading that disfavors pre-emption.'" *Id.* That canon requires "'a narrow interpretation'" of §4617(b)(12) that leaves the state statutes of repose here undisturbed. *Id.*

decision in *UBS*, which held that HERA preempts state statutes of repose, and it determined that nothing in *CTS* "seriously undermine[d]" *UBS*. App.39. But both the methodology and the conclusion are seriously flawed. As it did with respect to Section 13's statute of repose, the Second Circuit left in place a rule demonstrably irreconcilable with this Court's precedents.

B. Whether Provisions Extending Statutes of Limitations Displace Statutes of Repose is an Important and Recurring Question Warranting Review Here.

As the Court's recent grants of certiorari in *ANZ* and *CTS* attest, the proper characterization of statutes of limitations vis-à-vis statutes of repose is an exceptionally important issue warranting the Court's review. And the only thing more troubling than allowing a statute that does not so much as mention statutes of repose to override them nonetheless is to allow such an override for the exclusive benefit of the federal government. The policies behind statutes of repose are nowhere more important than when a defendant faces the full litigation resources of the federal government. And the constitutional concerns about disregarding vested rights in repose are particularly acute when that statutory interpretation benefits only the federal government and does so to the tune of hundreds of millions of dollars.

Moreover, HERA is not the only federal statute that has been wrongly interpreted to override statutes of repose to the federal government's exclusive benefit. Nearly identical "extender" provisions govern actions brought by the Federal Deposit Insurance Corporation

(FDIC), 12 U.S.C. §1821(d)(14), and the National Credit Union Administration Board (NCUA), *id.* §1787(b)(14). And just as FHFA did here, those agencies have used their "extender" provisions to bring actions against private parties and recover massive damages awards (or reach massive *in terrorem* settlements) premised on claims otherwise barred by statutes of repose. *See, e.g.*, *NCUA v. RBS Sec. Inc.*, 833 F.3d 1125 (9th Cir. 2016); *FDIC v. RBS Sec. Inc.*, 798 F.3d 244 (5th Cir. 2015), *cert. denied*, 136 S. Ct. 1492 (2016). Indeed, the *$800 million* judgment in this case alone—which would be barred by statutes of repose absent the Second Circuit's erroneous conflating of limitations and repose—confirms the significance of the question presented. That crushing liability well explains why the defendants in the fifteen other suits settled, and it demonstrates the inherent inequity of handing the federal government—and the federal government alone—a get-out-of-repose-free card.

The importance of the erroneous decision below is amplified by the fact the Second Circuit is at the epicenter of the Nation's securities markets. Securities Act claims may be filed in any "district wherein the defendant is found or is an inhabitant or transacts business, or in the district where the offer or sale took place, if the defendant participated therein." 15 U.S.C. §77v(a). Nearly every participant in the financial markets does business in New York, and the Second Circuit is rightly "regarded as the 'Mother Court' in this area of the law." *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 762 (1975) (Blackmun, J., dissenting). Given the Second Circuit's favorable (and now settled) precedent rejecting *ANZ*

and *CTS*, future claims by the government relying on extender statutes will almost certainly be filed in New York federal courts.

Finally, securities law is "an area that demands certainty and predictability." *Pinter*, 486 U.S. at 652. Indeed, it was precisely because Congress "fear[ed] that lingering liabilities would disrupt normal business and facilitate false claims," *Anixter v. Home-Stake Prod. Co.*, 939 F.2d 1420, 1435-36 (10th Cir. 1991), *judgment vacated on other grounds by Dennler v. Trippet*, 503 U.S. 978 (1992), that it amended the Securities Act to provide defendants "full and final security"—*i.e.*, "complete peace"—"after three years," in the form of the statute of repose. *ANZ*, 137 S. Ct. at 2052; *see* 78 Cong. Rec. 8709-10 (1934). The time for reviewing the Second Circuit's effective elimination of that protection—when the federal government is the plaintiff—is now.

II. The Court Should Grant Certiorari To Determine Whether Claims Under Section 12(a)(2) Of The Securities Act Must Be Tried By A Jury.

The Seventh Amendment provides that "[i]n Suits at common law" exceeding twenty dollars in value, "the right of trial by jury shall be preserved." U.S. Const. amend. VII. A claim under Section 12(a)(2) of the Securities Act is precisely such a "Suit[] at common law" for which the jury right "shall be" preserved. The elements of a Section 12(a)(2) claim parallel the elements of a Section 11 claim, which is indisputably legal in nature. And a Section 12(a)(2) claim authorizes recovery of damages—the classic form of legal relief—as well as a form of rescission that

tracks rescission *at law* but not rescission *in equity*. The Second Circuit nonetheless held that Section 12(a)(2) claims are categorically equitable, rubber-stamping the district court's deprivation of petitioners' jury-trial right when the government tactically abandoned its Section 11 claim at the eleventh hour. That holding cannot be reconciled with this Court's precedents, warranting plenary review of this important question.

A. Section 12(a)(2) Claims Trigger the Seventh Amendment Right to a Jury.

A two-step analysis governs the question whether a statutory action is legal or equitable and thus triggers the Seventh Amendment jury right. First, courts "compare the statutory action to 18th-century actions brought in the courts of England prior to the merger of the courts of law and equity." *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 42 (1989). Second, and "more important," courts then "examine the remedy sought and determine whether it is legal or equitable in nature." *Id.* Under this framework, Section 12(a)(2) claims plainly trigger Seventh Amendment protections.

1. A Section 12(a)(2) claim is akin to a common-law legal claim and has no equitable analog in 18th-century English courts. Under Section 12(a)(2), "[a]ny person who … offers or sells a security … by means of a prospectus … shall be liable … to the person purchasing such security from him" if the prospectus "includes an untrue statement of a material fact or omits to state a material fact" and the purchaser "did not know, and in the exercise of reasonable care could not have known, of such untruth or omission." 15

U.S.C. §77*l*(a)(2). Those elements "parallel" Section 11, *Morgan Stanley*, 592 F.3d at 359, under which liability turns on whether "the registration statement … contained an untrue statement of a material fact or [omission]" and the purchaser did not "kn[o]w of such untruth or omission," 15 U.S.C. §77k(a). It is undisputed that a Section 11 claim is a legal claim that triggers the Seventh Amendment. *See id.* §77k(e) (authorizing recovery of "damages" only); *see also, e.g.*, *Hohmann v. Packard Instrument Co.*, 471 F.2d 815, 819 (7th Cir. 1973) (noting that "[a] jury trial is appropriate" for Section 11 claims); H.R. Rep. No. 73-85, at 9 (1933) (Section 11 creates "legal liability"). Given its "parallel" elements, a Section 12(a)(2) claim is a legal claim as well.

Furthermore, rescission under Section 12 "differs significantly" from the common-law doctrine of "equitable[] rescission." *Pinter*, 486 U.S. at 641 n.18. In courts of equity, a claim for rescission required the plaintiff to prove that he justifiably relied on a misstatement that the defendant knew to be false. *See* Joseph Story, *Commentaries on Equity Jurisprudence* §§191, 193, 195, 199, 200, 391 (4th ed. 1846). But Section 12 (like Section 11) has no justifiable reliance requirement, and a defendant's state of mind is irrelevant under the statute. *Rombach v. Chang*, 355 F.3d 164, 169 n.4, 171 (2d Cir. 2004).

2. The nature of the Section 12(a)(2) remedy bolsters the conclusion that the claim triggers the Seventh Amendment. Under Section 12(a)(2), a plaintiff may recover one of two mutually exclusive remedies. If he still owns the security, he may sue for rescission "upon the tender of such security"; but "if he

no longer owns the security," he may sue only "for damages." 15 U.S.C. §77*l*(a)(2). "Money damages are, of course, the classic form of *legal* relief." *Mertens v. Hewitt Assocs.*, 508 U.S. 248, 255 (1993). Consequently, at least one of the two forms of relief under Section 12(a)(2) is indisputably legal.

As for the other form of relief, while courts today typically describe rescission as an equitable remedy, *see, e.g.*, *Rosenfield v. HSBC Bank, USA*, 681 F.3d 1172, 1184 (10th Cir. 2012), that was not always the case. Rather, in 1791 and thereafter, the common law recognized two forms of rescission—rescission at law and rescission in equity—that were critically distinct. Claimants pursuing rescission at law had to identify proper grounds to rescind (*e.g.*, fraud or duress) and to provide clear and unambiguous notice of rescission. 2 Henry C. Black, *A Treatise on the Rescission of Contracts and Cancellation of Written Instruments* §569, 1341 (1916). Claimants pursuing rescission in equity, however, were not subject to any such "inexorable formula." *Marr v. Tumulty*, 75 N.E. 356, 357 (N.Y. 1931) (Cardozo, C.J.). Moreover, courts recognized that an action in equity "does not proceed as *upon* a rescission, but proceeds *for* a rescission." *Gould v. Cayuga Cty. Nat'l Bank*, 86 N.Y. 75, 83 (1881) (emphases added).

These distinctions are critical here. Rescission is available under Section 12 only "upon the tender of [the] security," 15 U.S.C. §77*l*(a), which tracks rescission at law, not in equity. *Compare* Hugh S. Koford, *Rescission at Law and in Equity*, 36 Cal. L. Rev. 606, 607 (1948) ("Notice and offer to restore … must precede an action at law."), *with* Restatement

(First) of Restitution §65 cmt. d (1937) ("[I]n equity … there need be no offer to restore antecedent to the proceedings."), *and Oubre v. Entergy Operations, Inc.*, 522 U.S. 422, 426 (1998). In sum, Section 12(a)(2)'s rescission remedy tracks rescission at law, not rescission in equity, confirming that the claim triggers the Seventh Amendment.

3. The Second Circuit's contrary holding depended on a fundamentally flawed premise. According to the Second Circuit, *this* Court has previously "recognized that a Section 12(a)(2) action is the Securities Act-equivalent of equitable rescission," creating a "long-established consensus that Section 12(a)(2) is an equitable claim that authorizes equitable relief." App.91-92. The three decisions on which the Second Circuit relied for that critical proposition, however, demonstrate no such thing.

In the first decision, *Deckert v. Independent Shares Corp.*, 311 U.S. 282 (1940), the Court merely rejected the sweeping proposition that the Securities Act "restrict[s] purchasers seeking relief under its provisions to a money judgment." *Id.* at 287. The petitioners sought "an accounting, appointment of a receiver, an injunction pendente lite, and for return of [their] payments." *Id.* at 288. Given that mix of claimed relief, much of which was indisputably equitable, the decision—that the allegations, if proven, would allow for equitable relief—provides no guidance as to whether Section 12(a)(2) claims are equitable claims categorically beyond the Seventh Amendment's purview.

The next decision, *Gustafson v. Alloyd Co.*, 513 U.S. 561 (1995), is even less relevant. *Gustafson*

simply recognized that Section 12 grants "the right to rescind." *Id.* at 571. As explained, however, rescission can be at law or in equity, and *Gustafson* did not have reason to explore that distinction. *Gustafson* thus sheds no light on the question here.

The last decision, *Pinter v. Dahl*, addressed (as relevant here) the meaning of "seller" in Section 12. In a footnote, the Court stated that "Section 12 was adapted from common-law (or equitable) rescission." 486 U.S. at 641 n.18; *see* App.87-89. But in the very next sentence, the Court went on to emphasize that Section 12 "differs significantly from the source material." 486 U.S. at 641 n.18. The Court also expressly equated Section 12's rescission remedy with Section 12's damages remedy. *Id.* These observations amount to a wash and certainly do not reflect a conclusion that Section 12(a)(2) claims are categorically equitable claims that fail to trigger the Seventh Amendment jury right.

Since *Pinter*, moreover, the differences between rescission in equity and rescission under Section 12 have only become more distinct, and the basis for treating Section 12(a)(2) claims as triggering the Seventh Amendment more robust. At common law, equitable rescission required the seller to refund to the buyer the full original purchase price in exchange for the purchased item. *See Lyon v. Bertram*, 61 U.S. (20 How.) 149, 154-55 (1857). In 1995, however, Congress added a loss-causation defense to Section 12. Private Securities Litigation Reform Act of 1995, Pub. L. No. 104–67, §105(3), 109 Stat. 737, 757 (codified at 15 U.S.C. §77*l*(b)). As a result, a plaintiff's rescissionary remedy under Section 12(a)(2) may now be reduced—

or nullified entirely—to the extent the plaintiff's loss was caused by something other than the alleged misstatement or omission. *See* 15 U.S.C. §77*l*(b). Such a safety valve for defendants, limiting the value of any rescission to a measure of damages, would have been anathema in equity.[8]

In short, the Court has never held that Section 12(a)(2) claims sidestep the Seventh Amendment or that such claims categorically fall to the equitable side of the *Granfinanciera* framework. If anything, by equating Section 12(a)(2)'s damages and rescission remedies, *see Pinter*, 486 U.S. at 641 n.18, the Court has cast doubt on those propositions, which Congress' addition of a loss-causation defense only underscores.[9]

B. This Question is Exceedingly Important.

Petitioners need not belabor the obvious importance of the Seventh Amendment right to a jury.

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[8] So too would the substantive requirements of loss causation. Loss causation implicates the doctrine of proximate cause, which defines the scope of *legal* liability but did not constrain a chancellor's discretion to do equity. *See CSX Transp., Inc. v. McBride*, 564 U.S. 685, 692-93 (2011).

[9] The Second Circuit also held that the nine other defendants besides petitioners were not entitled to a jury trial. But it is undisputed that those nine defendants did not sell any securities nor obtain or possess the proceeds of the sale of those securities; accordingly, those defendants were entitled to a jury trial. *See Great-West Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204, 214 (2002) ("[F]or restitution to lie in equity, the action generally must seek … to restore to the plaintiff particular funds or property *in the defendant's possession*." (emphasis added)). Because petitioners' co-defendants were entitled to a jury trial, so too were petitioners. *See, e.g.*, *Collins v. Gov't of Virgin Islands*, 366 F.2d 279, 285 (3d Cir. 1966).

"Trial by jury is a vital and cherished right, integral in our judicial system." *City of Morgantown*, 337 U.S. at 258. As a result, "any seeming curtailment of the right to a jury trial should be scrutinized with the utmost care." *Dimick v. Schiedt*, 293 U.S. 474, 486 (1935).

That is particularly true in the context of the Securities Act. Sections 11 and 12(a)(2) both impose strict (or near-strict) liability. App.413-15. In many Securities Act cases, therefore, the critical question is not what happened, but whether what happened was reasonable—and even if it was not, what amounts can be deducted as unrelated to the misstatement or omission. That is precisely the context in which the Framers expected a jury of peers to "reach a result that the judge either could not or would not." Charles W. Wolfram, *The Constitutional History of the Seventh Amendment*, 57 Minn. L. Rev. 639, 671 (1973). The Framers adopted the Seventh Amendment to preserve the jury's ability to do so. The decision below tramples that constitutionally protected prerogative. This Court's review is imperative.

CONCLUSION

The Court should grant the petition.

Respectfully submitted,

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